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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 386

RISS & COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT OF INTERVENING RAILROADS, APPELLEES, OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND MOTION TO DISSOLVE STAY.

AMOS M. MATHEWS,
FRANCIS J. STEINBRECHER,
LEWIN W. WICKES, JR.,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 386

RISS & COMPANY, INC., A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY AND OTHER CLASS I RAILROADS,
Intervenors-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

OPPOSITION TO STATEMENT AS TO JURISDICTION, MOTION TO AFFIRM OR DISMISS, AND MOTION TO DISSOLVE STAY.

These appellee railroads, intervenors before the Court below, submit this statement in opposition to appellant's statement as to jurisdiction, and in support of their motion

to dismiss or affirm and motion to dissolve temporary stay, respectfully show:

Statement of the Case

This appeal involves a controversy before the Interstate Commerce Commission concerning the interpretation of a permit of temporary authority granted by the Commission to appellant.

The issues involved are very simple, despite appellant's efforts to make the case look complex.

1. The Appellant Has Not Exhausted Its Administrative Remedies

In the present case, in the Commission's report (54 MCC 531) interpreting appellant's authority, the Commission said:

> "The transportation of dangerous explosives by Riss is authorized only to the extent indicated in the appendix. Any other service in the transportation of dangerous explosives is not authorized in No. MC-200 (Sub-No. 60TA). If there is a need for additional transportation service, it may be met by the filing of further properly supported applications for temporary or permanent authority."

This indication by the Commission of the proper procedure to be followed by Riss is contained in the Commission's report of June 2, 1952. It was not until over fourteen months later, August 25, 1953, the day after Riss took this appeal, that Riss actually applied for temporary authority, as suggested by the Interstate Commerce Commission. Riss persisted for over a year in the performance of operations which the Commission had held illegal. Certainly, if it is proper for Riss to file an application for temporary authority pending this appeal to the Supreme Court, it could

have, with equal propriety, filed the application as early as June 3, 1952, pending its first petition for reconsideration by the Commission of its order of June 2.

Appellant, therefore, has not exhausted its administrative remedies before the Interstate Commerce Commission. The granting or withholding of temporary authorities is a matter peculiarly within the power and discretion of the Commission under Sec. 210a. (a) of the Interstate Commerce Act:

> "(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

The appellant even now is proceeding before the Commission under this section to obtain the very rights involved in this appeal. Therefore, it is clear appellant has not exhausted administrative remedies available to it under the Interstate Commerce Act.

2. In Any Event, the Appeal Involves No Question of Substance and the Supreme Court Should Dismiss or Affirm.

The assignment of errors, while prolix and repetitive, actually raises no question of substance.

The issues involved are starkly simple. The extended proceedings have brought forth a plethora of detailed argu-

ments on the procedure and merits. The simplicity of the issues, therefore, may be better appreciated by brief review of the case from the beginning.

Appellant filed an application [1] for the Sub 60 temporary authority involved in this appeal, and the Interstate Commerce Commission issued the permit.[2] Assuming, for illustration, that the permit authorized appellant to operate between A and B,[3] appellant interpreted the authority to cover A, B, X, Y, and Z,[4] and it openly and notoriously and to the knowledge of the Commission operated in this fashion.[5]

The railroads, having authority to operate between all these points and being injured by the unauthorized diversion of traffic, filed a petition asking the Commission to issue a

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[1] The application filed on March 1, 1946, requested "temporary authority . . . to June 30, 1946 . . . to transport explosives . . . over regular . . . routes between points named in I.C.C. order of February 3, 1945 in . . . MC-200, Sub 46 (formerly Monark Motor Freight System, Docket MC-30077). A map of proposed regular routes . . . is attached hereto and made a part hereof. . . ." According to appellant, therefore, the map shows the "regular . . . routes between points name in I.C.C. order of February 3, 1945 in . . . MC-200 Sub 46 (formerly Monark Motor Freight System, Docket No. 30077)."

[2] The I.C.C. order in MC-200, Sub 60TA of April 15, 1946, granted the application without hearings or other proceedings and gave plaintiff temporary authority to transport dangerous explosives "To, from, and/or between points and places authorized to be served in connection with Docket Nos. MC-30077 and effective sub numbers thereunder which were acquired by applicant herein."

[3] ". . . points and places *authorized to be served* in connection with Docket Nos. MC-30077. . . ."

[4] Appellant contends the authority covers "points *claimed* in Docket MC-30077," even though not included in the earlier order of February 3, 1945.

[5] The Interstate Commerce Commission (Report of June 2, 1952) said: "As seen, petitioners allege that Riss [Appellant here] has been performing service in the transportation of dangerous explosives at points not included in the appendix herein. Riss has not denied this allegation, but rather claims and, in effect, holds itself out to transport dangerous explosives to numerous points not embraced in the appendix." 54 M.C.C. 531.

cease and desist order to prevent appellant from exceeding its lawful authority. In its answer the appellant stated that it was, in fact, operating between A, B, X, Y and Z,[6] but contended that this was the scope of the authority as issued. Thus, the only possible issue of fact, the extent of appellant's actual operations, was never in question. The record before the Commission consisted of appellant's application for the Sub 60TA, the permit itself, and any documents incorporated by reference by the application and permit, and finally, the pleadings raising the question of interpretation, namely, the petition for a cease and desist order and the appellant's answer.

This record contained everything upon which the Commission issued the permit. The pleadings (petition for cease and desist order and answer thereto) raised two issues: (1) the extent of appellant's operations; and (2) the scope of the authority. The first issue and the only one of fact was resolved by the appellant's statements in its answer. Hence, the only question remaining before the Commission was that of the disputed interpretation of its permit. The Commission decided this question favorably to the railroads' contention—that is, that the permit covered only "A and B," and any operations in excess of that were unlawful.[7]

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[6] "During the course of the proceedings in Sub-No. 84 which have lasted over four years, Riss has shown extensive operations under Sub-No. 60TA which the railroads now claim to have been illegal." Motion to Dismiss and Answer of Riss and Company, Inc., to Petition of Eastern Railroads and Class I Railroads in Western Territory for Issuance of a Cease and Desist Order.

[7] The grant defined in the Commission's decision is the same, the Commission says, as the original grant of April 15, 1946. In its terms the report grants by specifying in detail what the original order had granted by reference to MC-30077. The cease and desist order merely limits the grant to the same extent as it was limited by law in the original order of April 15, 1946 by specifically directing the plaintiff not to go beyond the scope of the grant.

The appellant has persistently complained that it was not afforded a hearing. The three-judge court, from whom this appeal is taken, decided that appellant was afforded a hearing which fully met the requirements of the Interstate Commerce Act, and Administrative Procedure Act and the Commission's rules. While the appellant asserts that it should have had and desires a hearing (apparently, in the narrow sense of an oral presentation of evidence by witnesses), it has never at any stage of the proceedings before the Commission or the court below specified one iota of evidence which it would produce. Appellant has constantly complained that in the absence of a "hearing" it was not given an opportunity "to cross-examine witnesses." No other party to these proceedings has proposed to introduce the testimony of any witnesses, so that it is impossible to determine who the appellant wants to cross-examine. The only question of fact, the scope of appellant's actual operations, is not put in issue by the pleadings; it is fundamental, therefore, that no tribunal would be justified in hearing the testimony of witnesses concerning the scope of appellant's operations. The only other question for determination by the Commission was the scope of appellant's authority, Sub 60 TA. The petition for a cease and desist order was filed in this docket, as were all subsequent pleadings, including appellant's answer and motion to dismiss, its petition for reconsideration, and the various replies thereto. It was on the basis of the record in this docket that the Commission originally issued the permit granting the temporary authority. It would be absurd to think that the Commisison could not properly *interpret* the permit on the basis of the very same record upon which it *issued* the permit.

It is apparent from the above that appellant had every opportunity to be heard, was heard, and that its position and arguments were carefully considered by the Commission.

It has been the railroads' consistent position that the petition for cease and desist order was properly filed under the Commission's General Rules of Practice, Rule 102, providing for relief not otherwise provided for in the rules of practice. The Commission so held. There is no requirement for a hearing of issues raised by petitons under Rule 102 in the Commission's rules or in any applicable statute. Hence, we believe the Commission might well have interpreted the permit on the basis of the record on which the permit was issued without further procedure. Nevertheless, the appellant was notified of the filing of the petition, and the appellant was afforded the opportunity to and did answer, and after the Commission's decision appellant petitioned for reconsideration. Each of these steps by appellant was delayed at appellant's request by permission of the Commission.

The appellant contended that the petition should be treated as a complaint under Section 204(c) of the Interstate Commerce Act, and this Section requires that respondent have an opportunity to be heard. It has been our position that, even assuming with appellant that the petition should be treated as a complaint, the only question of fact was resolved by appellant's admission in its answer, and any oral hearing on this question would, therefore, under the most fundamental rules of pleading be superfluous and vain, and further, that on the issue of the interpretation of its authority, appellant had an opportunity to be heard in its further pleadings. It is of the greatest significance that never in any document or argument before any tribunal considering this case has the appellant specifically described one scintilla of evidence which it would propose to introduce in any oral hearing. The court, from which this appeal was taken, held that the petition should be treated as a complaint, but that appellant was heard, had its day in court, and was

deprived of no right in the determination of the issues raised in connection with the interpretation of the permit.

Hence, under any possible interpretation of the legal requirements of the procedure before the Interstate Commerce Commission, the appellant has been deprived of no right and its interests have not been prejudiced. Appellant's effort, therefore, to breathe into the narrow question of the scope of its temporary authority some broad significance affecting motor carriers generally, is completely without merit. The only question involved in these proceedings is the scope of appellant's temporary authority. By no stretch of the imagination can this be expanded into a matter of significance to anyone except the appellant and his immediate competitors. It is not a question of broad scope or of interest to the industry in general. Furthermore, the question of the interpretation of a single permit issued by the Interstate Commerce Commissoin is certainly one peculiarly within the special competence of the Commission itself.

One possible question remaining is the scope of the reviwe by the three-judge court. The court, in its first opinion, dismissed the appellant's complaint on the basis that the appellant had not met its burden of proof in that appellant failed to produce before the district court a copy of an order of the Interstate Commerce Commission in ICC Docket MC 200 Sub. 46. In its motion for new trial, plaintiff contended that the order in question was sufficiently before the court, that the court should take judicial notice of the order, that there was no question which needed to be considered in the light of the scope of the order, and then proceeded to re-argue the merits of the case. The other parties in one fashion or another granted that the order was sufficiently before the court, and the interested defendants, namely, the railroads, argued the merits *in extenso* in arguing the motion for new trial. The court dismissed the motion for

new trial without opinion or discussion. Obviously, therefore, the court considered all the arguments of all the parties presented to it at that time, including the merits, in dismissing the motion for new trial, and, therefore, ultimately dismissing the complaint, fully affirmed the I.C.C.

Read in the light of the above statement, the assignments of error obviously do not raise any question of substance.

WHEREFORE these appellees respectfully move that the appeal be dismissed, or that the judgment of the District Court be affirmed.

3. By Reason of Appellant's Delay in Invoking the Administrative Remedy Open to It, It Has Forfeited Any Right to Further Stay.

Riss has persisted in the performance of operations which the Commission has held illegal for over fourteen months, meanwhile protecting itself through this series of appeals even though, as shown, it has been given every opportunity to be heard. Furthermore, this experienced litigant has at no time alleged any specific fact which it might prove in an oral hearing. It has thus not shown that it was damaged in any way. Certainly a sincere effort to comply with the views of the administrative agency would have called for a prompt and proper application for temporary or permanent authority rather than mere arrogant persistence in continuing unlawful operations. And, furthermore, appellant's own estimate of the merits of the present appeal is shown by the simultaneous application for temporary authority in which appellant stated that it will, on September 1, 1953 (expiration of District Court's stay pending appeal), no longer have authority to render the service.

Hence, having so far delayed the perfectly proper cease and desist order of the Commission until a point at which it must inevitably become effective, Riss has finally seen fit to follow a proper and orderly procedure in an effort to

legalize a part of the extensive unlawful operations it has been carrying on. Even now, appellant has not yet applied for temporary authority to cover some of the operations held unlawful by the Commission and as to these appellant's laches are even more flagrant.

Continuance of these unlawful operations by Riss diverts traffic and revenue from competitors duly authorized to handle it, including these appellees. It would be unconscionable to continue in effect a stay permitting these operations when appellant has failed for 14 months to apply for temporary authority for some of them and even now has not taken this step as to the rest.

WHEREFORE appellees respectfully move that the Court dissolve the temporary stay granted in this proceeding by Mr. Justice Clark.

Respectfully submitted,

AMOS M. MATHEWS
FRANCIS J. STEINBRECHER
LEWIN W. WICKES, JR.
Counsel for Intervenor Appellees
280 Union Station Bldg.
Chicago 6, Illinois